No. 89-1974 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE PULITZER PUBLISHING COMPANY AND EDWARD H. KOHN,

Petitioners,

v.

CERTAIN INTERESTED INDIVIDUALS, JOHN DOES I-V, WHO ARE EMPLOYEES OF MCDONNELL DOUGLAS CORPORATION AND MCDONNELL DOUGLAS CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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22

QUESTION PRESENTED

Was the court of appeals correct in holding, when a grand jury investigation is still continuing, that the privacy rights of the unindicted respondents outweigh a newspaper's qualified right to inspect sealed search warrant affidavits, prepared by federal investigators, which could seriously damage the reputations and careers of those persons and which consist largely of interpretations selectively made from conversations intercepted pursuant to Title III electronic surveillance over two years ago?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Introduction	1
Statement of the Case	2
Background	2
The Decision Below	4
Reasons Why The Writ Should Not Be Granted	6
I. The Eighth Circuit Did Not Create Or Expand Any Privacy Rights	6
II. The Eighth Circuit's Holding That Privacy Interests Of Unindicted Persons In Personal And Business Conversations Outweigh Any Qualified Right Of Access To Search Warrant Affidavits At This Time Is Completely Consistent With This Court's First Amendment Precedents	8
III. There Is No Conflict In The Circuits With Respect To The Issue Decided By The Eighth Circuit	12
Conclusion	15

TABLE OF AUTHORITIES

Page

Cases:

Berger v. New York, 388 U.S. 41 (1967) 6,7

Butterworth v. Smith, ____ U.S. ____, 110 S. Ct. 1376 (1990) 11

Connecticut Railway & Lighting Co. v. Palmer, 305 U.S. 493 (1939) 12

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) 7

Gelbard v. United States, 408 U.S. 41 (1972) 7

Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982) 9

G.M. Leasing Co. v. United States, 429 U.S. 338 (1977) 8

Illinois v. Abbott & Associates Inc., 460 U.S. 557 (1983) 7,8

In re Application of Newsday, Inc., 895 F.2d 74 (2d Cir.), *cert. denied,* 110 S. Ct. 2631 (1990) 14

In re New York Times Co., 834 F.2d 1152 (2d Cir. 1987) 13

In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569 (8th Cir. 1988) 3,4,5

Katz v. United States, 389 U.S. 347 (1967) 6,7,8

Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) 9,10

Olmstead v. United States, 277 U.S. 438 (1928) 6

Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501 (1984) 9,10

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 9-10

Rowan v. United States Post Office Department, 397 U.S. 728 (1970) 11

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) 11

The Florida Star v. B.J.F., 491 U.S. ____, 109 S. Ct. 2603 (1989) 11

Times Mirror Co. v. United States, 873 F.2d 1210 (9th Cir. 1989) 8,12,13

United States v. Haller, 837 F.2d 84 (2d Cir. 1988) 11

United States v. Lovett, 328 U.S. 303 (1946) 12

United States v. Procter & Gamble Co., 356 U.S. 677 (1958) 7

United States v. Rose, 215 F.2d 617 (3d Cir. 1954) 7

United States v. Smith, 776 F.2d 1104 (3d Cir. 1985) 8,11,12

Vasquez v. United States, 454 U.S. 975 (1981) 12

Waller v. Georgia, 467 U.S. 39 (1984) 9

Walters v. National Ass. of Radiation Survivors,473 U.S. 305 (1985) 10

Watkins v. United States, 354 U.S. 178 (1957) 12

Constitution, Statutes, and Other Authorities:

18 U.S.C. § 2510 *et seq.* .....*passim*

18 U.S.C. § 2518 (10)(a) 4

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 *U.S. Code Cong. & Admin. News* 2112 7,10

U.S. Const. Amend. I ..... *passim*

U.S. Const. Amend. IV 4,6,8,13

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Respondents John Does I-V, Thomas M. Gunn and McDonnell Douglas Corporation ("MDC") respectfully pray that this Petition for a Writ of Certiorari be denied.[1] The question raised by the Petition is not in fact presented by the decision below. As shown by our restatement of the question presented, the decision below rests on the application of existing principles to the specific factual situation before the court. The Eighth Circuit

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[1] Pursuant to Rule 29.1, Respondent McDonnell Douglas Corporation states that it is a publicly held corporation which has no parent company and no subsidiaries except those which are wholly-owned. The John Doe respondents, who are all MDC employees, will submit their actual names under seal to the Court if so requested.

made no novel legal or policy decision of general impact, and its decision created no genuine issue of lack of uniformity. There is nothing in the decision below which merits, much less requires, plenary review by this Court.

STATEMENT OF THE CASE

The Petition skims by, or flatly misstates, certain aspects of the facts which are material to the decision below and the reasons why this case does not merit review on certiorari. A brief restatement of the case is therefore necessary.

Background

In connection with a wide-ranging FBI investigation into the defense contract industry known as "Ill Wind," in June 1988 United States district courts located in several states issued at least 40 search warrants. Two of these, issued by the United States District Court for the Eastern District of Missouri, authorized the search of the office of Thomas M. Gunn, an employee of MDC, and the secretarial area outside his office. At the request of the United States, the affidavits and documents supporting the search warrants were filed under seal in most of the districts where Ill Wind searches were executed. The government had the search warrant affidavits sealed in the instant case.

More than two years have passed since those searches, and no indictments involving MDC or its employees have been returned. There has been a lengthy post-search investigation, and accordingly the allegations in the sealed search warrant affidavits, based upon information and beliefs existing at the time of the search, could be entirely different from the state of the government's knowledge now. They represent its understanding or interpretation of circumstances over two years ago, prior to interviewing numerous witnesses and reviewing thousands of documents and

material supplied by MDC in cooperation with government representatives.[2]

The investigation is still continuing. The record indicates, however, that the government has decided *not* to prosecute one of the respondents, an MDC employee, whose activities and conversations are included in the affidavits. The record also indicates that the government has made no decision to seek any indictment of the other respondents.

Respondents have never been allowed to see the affidavits at issue or any parts thereof. The courts below examined the affidavits and noted that they are composed almost entirely of detailed and extensive excerpts from (and references to) oral and telephone communications which were intercepted through wiretaps and electronic surveillance under the federal wiretap statute, 18 U.S.C. § 2510 *et seq.* ("Title III"). *See* Petitioners' Appendix ("App.") A-13 & A-14; *see also In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 574 (8th Cir. 1988) ("*Search Warrant I*") ("[v]irtually every page contains multiple references to wiretapped conversations"); *id.* at 571 ("redaction on a line-by-line basis was impracticable because of the complex and interrelated nature of the allegations and the large number of individuals and activities involved").

Petitioners' repeated statement that these conversations were "legally" or "lawfully" wiretapped (Pet. 9, 11) is somewhat misleading and begs several questions. Precisely because the investigation of respondents has not resulted in any prosecution, they have not been, and may never be, involved in any proceeding in which they could file a motion testing the legality of

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[2] The dated nature of the affidavits and respondents' unindicted status stand in sharp contrast to much of the Justice Department's Ill Wind investigation. As petitioners point out, more than 35 prosecutions have resulted from this investigation.

the wiretaps, as provided for in Title III. *See* 18 U.S.C. § 2518(10(a).

Petitioners Pulitzer Publishing Company, publisher of the *St. Louis Post-Dispatch,* and its employee Edward H. Kohn (collectively "Pulitzer") instituted an action for access to the sealed search warrant documents by opening a miscellaneous docket number in the District Court for the Eastern District of Missouri and filing a motion for access in July 1988. The district court ordered that the documents remain under seal, and in *Search Warrant I* the Eighth Circuit affirmed, with respondents appearing as *amici curiae.* 855 F.2d 569.

Back in the district court some time later, the government apparently abandoned its previous position that grand jury secrecy, individual privacy interests and the federal wiretap statute precluded public release. It informed the district court that because it "had partially achieved its prosecutorial goals," it would not actively oppose the public release of certain portions of the affidavits in this case, but it suggested that the court should consider the privacy interests of the persons named in the materials and took no position as to whether those interests justified continued sealing. Respondents thereafter participated in the proceeding with the standing of parties.

In September 1989, after a renewed motion for access by Pulitzer, the district court ordered the release of portions of the affidavits and associated documents, with certain limited redactions. The district court did not address in any way the Title III and Fourth Amendment interests affected by the electronic surveillance. *See* App. B.

The Decision Below

The Eighth Circuit reversed and ordered that the affidavits remain under seal. 895 F.2d 460. The court examined the Congressional intent to preserve privacy and the statutory structure of Title III. App. A-8 to A-11. It balanced privacy interests

against a qualified First Amendment right of access, App. A-11, taking particular note of the pernicious effects of disclosure of wiretapped conversations on unindicted individuals. App. A-12 to A-13. After referring to its observations in *Search Warrant I* about the detailed nature of the affidavits and the pervasive presence of Title III material, establishing that there was no less restrictive means of protecting respondents' privacy interests, the Eighth Circuit observed that disclosure "could seriously damage" the reputations and careers of various individuals. App. A-14.[1]

Most importantly, the court limited its conclusion that the affidavits should remain sealed to the pre-indictment period: "[T]he pre-indictment status of the government's criminal investigation tips the balance decisively in favor of the privacy interests and against disclosure of even the redacted versions of the search warrant affidavits *at this time.*" App. A-14. The Court of Appeals expressly did not restrict post-indictment access or Pulitzer's ability to investigate other sources and publish anything it discovers. *Id.*

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[1] This conclusion was not speculation; it was based on the court's *in camera* review of the affidavits.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The reasons for granting the writ propounded by the Petition basically depend on a series of mischaracterizations of the decision below. Any objective review of that decision demonstrates that the Eighth Circuit did not create any novel rights, did not depart from this Court's First Amendment precedents, and did not create any conflict among the circuits. The decision below simply applies existing rights and precedents to review and reverse a faulty exercise of discretion by a district court. It does not thereby present any issue which merits plenary review.

I. THE EIGHTH CIRCUIT DID NOT CREATE OR EXPAND ANY PRIVACY RIGHTS.

Pulitzer misdescribes the decision below and fails to acknowledge this Court's precedents affirming the privacy rights which exist here because (a) the affidavits are rife with electronic surveillance material, and (b) respondents have not been indicted. Thus, the repeated claim that the Eighth Circuit created or extended some novel right to privacy (Pet. 11-13) is simply not accurate.

The Eighth Circuit applied this Court's teachings that respondents have a constitutionally-based privacy interest in not having their conversations intercepted by electronic surveillance. App. A-8. "As a means of espionage," wrote Justice Brandeis more than 60 years ago, "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping." *Olmstead v. United States,* 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting). More recently, this Court held that warrantless wiretaps are unreasonable searches in violation of the Fourth Amendment, *Katz v. United States,* 389 U.S. 347 (1967), and reversed a conviction founded on the fruits of a wiretap warrant that left the government with discretion about how and when to use seized conversations. *Berger v. New York,* 388 U.S. 41 (1967).

The Eighth Circuit also applied a Congressionally-recognized privacy interest. App. A-8 to A-9. In direct response to *Katz* and *Berger*, Congress enacted Title III, which embodied the constitutionally-based privacy interest and created a comprehensive statutory structure for the regulation of electronic surveillance. Congress stated that "[t]he privacy of the communication to be protected is intended to be comprehensive," S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968), *reprinted in* 1968 *U.S. Code Cong. & Admin. News* 2112, 2179, and that "[o]nly by striking at all aspects of the problem can privacy be adequately protected." *Id.* at 69, 1968 *U.S. Code Cong. & Admin. News* at 2156. As this Court has stated, "[A]lthough Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern." *Gelbard v. United States*, 408 U.S. 41, 48 (1972).

Finally, as the Eighth Circuit recognized (App. A-12 to A-13) and as Pulitzer ignores, at the current stage of the government's investigation respondents have an established privacy interest in not being publicly associated with alleged wrongdoing. The current situation is analogous to a grand jury proceeding, and one policy underlying grand jury secrecy is "to protect the innocent accused who is exonerated from the disclosure of the fact that he has been under investigation." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n.10 (1979) (*quoting United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)). *See also United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958). This policy protecting privacy is based on the well-founded concern that premature disclosure of investigatory materials will irreparably injure private persons:

> In their quest for information grand juries often acquire reams of documents and hours of testimony later to be found irrelevant to the investigation or the final charge. Its wholesale disclosure could be embarrassing, if not destructive of third parties or of unindicted individuals and cor-

> porations concerned when witnesses are called upon to testify or furnish evidence which involves them. This is one of the principal reasons why grand jurors are sworn to secrecy.

Illinois v. Abbott & Associates, Inc., 460 U.S. 557, 564 n.8 (1983) (quoting the district judge). *See United States v. Smith*, 776 F.2d 1104, 1114 (3d Cir. 1985) (recognizing these privacy interests in unindicted co-conspirators); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1216 (9th Cir. 1989) (recognizing that these privacy interests apply to search warrant materials).

Thus, the Eighth Circuit simply recognized that, at this stage of the government's investigation, respondents and other unindicted third parties have privacy rights in having the affidavits remain under seal which are based on Fourth Amendment principles, the demonstrated Congressional intent in Title III, and other well-settled policies. There is nothing in the decision below which suggests the adoption of a novel or expanded right of privacy, and the court below certainly did not create a general federal right to privacy in contravention of anything in *Katz*. *Compare* Pet. 14 n.20.[4]

II. THE EIGHTH CIRCUIT'S HOLDING THAT PRIVACY INTERESTS OF UNINDICTED PERSONS IN PERSONAL AND BUSINESS CONVERSATIONS OUTWEIGH ANY QUALIFIED RIGHT OF ACCESS TO SEARCH WARRANT AFFIDAVITS AT THIS TIME IS COMPLETELY CONSISTENT WITH THIS COURT'S FIRST AMENDMENT PRECEDENTS.

The balance between respondents' privacy interests and Pulitzer's claimed right of access struck by the Eighth Circuit is

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[4] We note that MDC as well as the individual respondents plainly has privacy rights that would be affected by the disclosure sought by Pulitzer. *Compare G.M. Leasing Co. v. United States*, 429 U.S. 338, 353-54 (1977) *with* Pet. 9 n.13.

fully consistent with the First Amendment decisions of this Court. Indeed, in light of the precedents concerning electronic surveillance and grand juries, this Court's cases required the Eighth Circuit to hold exactly as it did. The Petition does not raise any issue of importance concerning the scope of the First Amendment; it merely quarrels with a particular result.

The First Amendment right of access asserted by Pulitzer is not absolute. *Globe Newspaper Co. v. Superior Court for the County of Norfolk,* 457 U.S. 596, 606 (1982). If closure "is essential to preserve higher values" and is narrowly tailored to serve these values, the court has an obligation to close the proceedings. *Press-Enterprise Co. v. Superior Court of California, Riverside County,* 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*").

This Court has recognized that privacy interests are "higher values" that may outweigh a public right of access even under this strict scrutiny. For example, in *Press-Enterprise I* the Court acknowledged that legitimate privacy concerns of prospective jurors may outweigh the public's right to attend *voir dire* or even to get a transcript of that part of the *voir dire.* 464 U.S. at 512. *See Waller v. Georgia,* 467 U.S. 39, 48 (1984) (noting that in certain circumstances privacy interests may well justify closure of suppression hearing); *cf. Globe Newspaper Co.,* 457 U.S. at 609.

The Eighth Circuit balanced the specific, recognized constitutional and statutory privacy rights of unindicted persons against the qualified right of access to search warrant materials asserted by Pulitzer.[5] It made a specific determination that the balance

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[5] There is nothing novel about reliance on Congressional intent in striking a balance concerning press access to documents. Both the majority opinion and the separate opinion of Justice White in *Nixon v. Warner Communications Inc.,* 435 U.S. 589 (1978), relied on the existence of a statute governing disclosure to deny access sought under the common law. In *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 600 n.5 (1980), Justice Stewart, concurring, wrote: "This is

tipped sharply in favor of respondents' privacy.[6] The decision below, barring disclosure of the search warrant materials directed at unindicted persons and filled with Title III and other private information, is narrowly tailored to preserve the interests that justify sealing. It stands in sharp contrast, for example, to the blunderbuss sealing condemned in *Press-Enterprise I*, 464 U.S. at 513. Contrary to Pulitzer's assertions, the Eighth Circuit did not fashion a new rule that privacy considerations always outweigh access interests (Pet. 9-10); rather, it applied this Court's First Amendment cases to the specific issue of access to Title III material during the investigatory period.[7] It

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not to say that only constitutional considerations can justify such restrictions [on rights of access to proceedings]. The preservation of trade secrets, for example, might justify the exclusion of the public from at least some segments of a civil trial." *See also Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (recognizing deference due to Congressional decision in face of First Amendment challenge).

[6] The interference with privacy interests created by electronic surveillance is, of course, truly frightening. As the Senate Judiciary Committee put it: "Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." S. Rep. No. 1097, 90th Cong., 2d Sess. 69 (1968), *reprinted in* 1968 *U.S. Code Cong. & Admin. News* 2112, 2154. Moreover, the very nature of a wiretap is that it overhears and records indiscriminately the thoughts and beliefs of the just and the unjust alike. The conversations of anyone who calls into a tapped phone, or speaks on bugged premises, are gathered into the net.

[7] The result below is also fully consistent with this Court's decision on the common-law right of access. The common-law right to inspect and copy judicial records is not absolute. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). Moreover, this Court has never suggested that a district court considering any access right must be deferred to when it totally ignores recognized privacy rights such as the conversational privacy rights implicated by wiretapping. *Compare* Pet. 10 n.16.

thus did exactly what this Court directed when it stated, in a different context in *The Florida Star v. B.J.F.*, 491 U.S. ____, 109 S. Ct. 2603, 2609 (1989), that "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."

This Court's First Amendment access decisions do not require any process more favorable to access than that used by the Eighth Circuit and do not compel any different result. *See also Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (upholding protective order based on privacy interests which prohibited publication of materials obtained through discovery); *The Florida Star v. B.J.F.*, 109 S. Ct. at 2609-10 (approving the confidentiality of proceedings as a way to protect privacy rights); *Butterworth v. Smith*, ____ U.S. ____, 110 S. Ct. 1376, 1381-82 (1990) (acknowledging the substantial interest that unindicted persons should not suffer public disclosure of accusations and distinguishing an order restricting use of information obtained through the judicial system from a permanent ban against publicizing information obtained independently); *Rowan v. United States Post Office Department*, 397 U.S. 728, 736 (1970) (upholding statute allowing recipients to require removal from mailing list, based on "right of every person to be let alone"); *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988) (privacy interests justified sealing portion of plea agreement); *United States v. Smith*, 776 F.2d at 1113-14 (sealing based on privacy interest upheld).

Pulitzer's references to the "compelling" need for public access to Ill Wind search warrants (Pet. 15) and the assertedly dire consequences of the decision below (Pet. 17) are plainly exaggerations that do not transform an unmeritorious Petition into a matter deserving this Court's attention. As Pulitzer elsewhere admits, the press and the public have had and continue to have plenty of opportunities to monitor the Ill Wind investigation because it has resulted in dozens of public prosecutions.

Most importantly, the limited sealing directed by the decision below does not absolutely insulate anything from public scrutiny. The frailty of Pulitzer's wild assertions is exemplified by its reliance on *Times Mirror,* which squarely rejects pre-indictment unsealing. *See also Watkins v. United States,* 354 U.S. 178, 200 (1957) (public right to be informed concerning workings of government "cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals"); *United States v. Smith,* 776 F.2d at 1114-15 (rejecting similar argument for unsealing).

III. THERE IS NO CONFLICT IN THE CIRCUITS WITH RESPECT TO THE ISSUE DECIDED BY THE EIGHTH CIRCUIT.

Pulitzer's claims that the decision below demonstrates a lack of uniformity in the circuits are almost entirely specious.[8] The issue decided by the Eighth Circuit was simply whether the privacy interests of unindicted persons in their wiretapped conversations justified continued sealing of wiretap materials during the pendency of a grand jury investigation. Petitioners do not point to a single circuit decision which even deals with this issue, much less one which contradicts the Eighth Circuit's decision that the particular privacy interests applicable to this situation are sufficiently compelling to deny immediate press access. The Ninth Circuit denied pre-indictment access in *Times Mirror.* Certainly all of the district court cases in which Ill Wind search warrant affidavits have been released (Pet. 15 n.21) were treated by those courts as *post-indictment* (indeed, post-guilty plea) disclosure to the public.

[8] There appears to be a difference among the circuits as to the exact nature of the right of access, if any, which attaches to search warrant affidavits, but this appearance is largely a function of differing factual situations. *No* circuit has ordered pre-indictment public disclosure of Title III material. Moreover, the Eighth Circuit recognized a qualified First Amendment right of access but concluded that even under that standard — the most favorable access standard ever recognized — Pulitzer was not entitled to unsealing at this time. Pulitzer was not aggrieved by the access standard used by the Eighth Circuit and therefore has no standing to suggest review on the basis of that issue. *See Connecticut Railway & Lighting Co. v. Palmer,* 305 U.S. 493, 496 (1939); *Vasquez v. United States,* 454 U.S. 975, 977 n.3 (1981) (Stevens, J.); *United States v. Lovett,* 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring).

The insinuation that the Eighth Circuit applied a different test of public access than that used by the Second Circuit is palpably wrong. The Eighth Circuit followed the Second Circuit approach. *Compare* Pet. 14 *with* App. A-11. Applying that test, both Circuits hold that sealing is permissible to protect Title III interests and that the right of privacy incorporated in Title III should weigh heavily in a court's balancing process. *In re New York Times Co.,* 834 F.2d 1152, 1154 (2d Cir. 1987); *see* App. A-12.

The claim that the decision below creates a conflict among the circuits as to whether Title III permits disclosure of intercepted conversations in search warrant affidavits (Pet. 16) is equally miscast. The Eighth Circuit expressly approved the use of Title III materials in such affidavits. App. A-10. At the risk of repetition, all the Eighth Circuit held was that nothing in Title III directly authorizes *public* disclosure now (App. A-9 through A-11), and that society's interests, including the conversational privacy rights recognized by Title III and the Fourth Amendment, outweigh a newspaper's interest in access *at this time* (*Id.* at A-14). The Eighth Circuit did not hold that Title III totally forbids public access to search warrant affidavits (*Id.*).

Pulitzer does not point to a single case addressing, much less resolving in a contrary manner, the issue actually decided by the Eighth Circuit. The cases it cites as allowing the use of wiretap information for law enforcement activities (Pet. 16) do not hold that such disclosure amounts to disclosure to the general public and therefore do not conflict with any statement or holding of the Eighth Circuit.

The decision below does not conflict with anything in *In re Application of Newsday, Inc.*, 895 F.2d 74 (2d Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 2631 (1990). That case is necessarily different and in some sense unrelated because it involved access to wiretap materials after a guilty plea. The Second Circuit did not, as Pulitzer suggests, hold that the use of wiretap information for law enforcement activities amounted to disclosure to the general public. Indeed, a petition for certiorari was filed in the *Newsday* case based in part on the alleged conflict with the decision below, and it has already been denied.[9]

[9] A petition for rehearing has been filed in the *Newsday* case. Its claim of conflict with the decision below, resting as it does on the same over-generalized characterization of the Eighth Circuit decision as Pulitzer employs, is no more persuasive than the original *Newsday* petition for certiorari.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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